INVOLUNTARY INTERPRISON TRANSFERS OF STATE PRISONERS AFTER *MEACHUM v. FANO* AND *MONTANYE v. HAYMES*

In the past decade the Supreme Court of the United States has begun to analyze and define, on a case-by-case basis, what rights criminal defendants retain after conviction and incarceration.[1] This ad hoc development of what could be called an inmate bill of rights continued in its 1975 Term as the Supreme Court addressed a new incident of prison life—the summary transfer of prisoners between state penal institutions.[2] Two prisoners' rights cases this term,[3] *Meachum v. Fano*[4] and *Montanye v. Haymes*,[5] raised the issue of the applicability of the fourteenth amendment's due process clause to the interprison transfer of state prisoners. Although its decisions of recent years had gradually broadened the nature of the constitutional interests retained by convicted persons,[6] the Court in *Meachum* and *Montanye* declared that, absent some state law or practice creating such rights, a prisoner's protected liberty interests do not include the right to stay where he is or the right to notice and hearing when involuntarily transferred to another prison.[7]

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[1] *See* section I.B. *infra*. For representative lower federal court decisions, see, *e.g.*, Washington Post v. Kleindienst, 357 F. Supp. 770 (D.D.C. 1972); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970).

[2] The Supreme Court recently avoided the issue in Preiser v. Newkirk, 422 U.S. 395 (1975), by holding the case moot by virtue of the prisoner's transfer back to his original prison.

[3] Two prisoner cases were decided before *Meachum* and *Montanye* in the 1975 Term. Baxter v. Palmigiano, decided with Enomoto v. Clutchette, 96 S. Ct. 1551 (1976). These cases involved the extent of due process procedures required in prison disciplinary hearings, to which the Court had held the due process clause applicable in Wolff v. McDonnell, 418 U.S. 539 (1974). Another prisoner case involving disciplinary transfers was vacated and remanded in light of *Baxter*. Lash v. Aikens, 96 S. Ct. 1721 (1976). *See also* Weinstein v. Bradford, 423 U.S. 147 (1975) (due process claim based on prison parole board's failure to give hearing prior to denial of parole opportunity held moot); Kerr v. United States Dist. Court, 96 S. Ct. 2119 (1976) (prisoner mandamus action); Estelle v. Williams, 96 S. Ct. 1691 (1976) (right to fair trial implicated by inmate garbed in prison clothes at state trial).

[4] 96 S. Ct. 2532 (1976).

[5] 96 S. Ct. 2543 (1976).

[6] *See* section I.B. *infra*. *See generally* Note, *Backwash Benefits For Second Class Citizens: Prisoners' First Amendment And Procedural Due Process Rights*, 46 U. COLO. L. REV. 377 (1975) [hereinafter cited as Note, *Backwash Benefits*]; Note, *Behind Closed Doors: An Empirical Inquiry into the Nature of Prison Discipline in Georgia*, 8 GA. L. REV. 919 (1974) [hereinafter cited as Note, *Prison Discipline*]; Case Note, 9 U. RICH. L. REV. 345 (1975).

[7] 96 S. Ct. at 2534; 96 S. Ct. at 2547. By holding that the summary transfers did not infringe a liberty interest protected by the due process clause, the Court obviated the decision of whether notice and hearing procedures would be required when state corrections law or

The decisions ended in large measure the controversy among the lower federal courts which, having heard a multitude of prisoner transfer cases in recent years, were divided over the issue of due process protection for inmates subject to involuntary transfers.[8] The

regulation created a right to avoid interprison transfer cognizable under the fourteenth amendment.

[8] The large body of prison transfer law developed in the lower courts involves intrastate transfers of state prisoners, similar to those at issue in *Meachum* and *Montanye*, but includes interstate transfers and transfers involving federal prisoners. While this Note will limit its discussion to intrastate transfers of state prisoners, the various kinds of transfer cases are cited below to illustrate the diverse results arrived at by the federal judiciary. *See, e.g.*, Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975), *modifying in part* 371 F. Supp. 482 (N.D. Ind. 1974), *vacated and remanded*, 96 S. Ct. 1721 (1976) (disciplinary transfer from state reformatory to prison requires hearing prior to transfer); Store v. Egeler, 506 F.2d 287 (6th Cir. 1974) (intrastate transfer to different custody level prison implicates due process); Fajeriak v. McGinnis, 493 F.2d 468 (9th Cir. 1974) (prisoners transferred interstate have no right to due process procedures); Gomes v. Travisono, 490 F.2d 1209 (1st Cir. 1973), *vacated and remanded*, 418 U.S. 909 (1974), *on remand*, 510 F.2d 537 (1974) (intrastate transfer of state prisoners to other state and federal prisons comparable to punishments requiring procedures comporting with due process); Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972) (no constitutional right to remain in any particular prison when prisoner transferred intrastate); Hillen v. Director, 455 F.2d 510 (9th Cir.), *cert. denied*, 409 U.S. 989 (1972) (no constitutional issue raised by transfer under Interstate Corrections Compact); Collins v. Bordenkircher, 403 F. Supp. 820 (N.D. W. Va. 1975) (granting equitable relief after transfer although no due process rights were implicated by summary transfer); Blair v. Finkbeiner, 402 F. Supp. 1092 (N.D. Ill. 1975) (intrastate transfer between maximum security prisons raises no constitutional issue); Daigle v. Hall, 387 F. Supp. 652 (D. Mass. 1975) (reclassification of prisoner resulting in his disciplinary segregation within one state prison held violative of due process); Clonce v. Richardson, 379 F. Supp. 338 (W.D. Mo. 1974) (transfer to behavioral modification program without hearing held to violate due process); Schumate v. New York, 373 F. Supp. 1166 (S.D. N.Y. 1974) (intrastate transfer requires no due process procedures unless adverse change in level of custody involved); Beatham v. Manson, 369 F. Supp. 783 (D. Conn. 1973) (no due process required in transfer from a higher to lesser security institution); Ault v. Holmes, 369 F. Supp. 228 (W.D. Ky. 1973) (accord); Croom v. Manson, 367 F. Supp. 586 (D. Conn. 1973) (interstate transfer requires only minimal procedures); Benfield v. Bounds, 363 F. Supp. 160 (E.D. N.C. 1973) (transfer between state prisons entirely a matter of administrative discretion); Hoitt v. Vitek, 361 F. Supp. 1238 (D.N.H. 1973) (interstate transfers require full trial-type due process procedures); White v. Gillman, 360 F. Supp. 64 (S.D. Iowa 1973) (punitive intrastate transfer from reformatory to penitentiary requires due process protection); Capitan v. Cupp, 356 F. Supp. 302 (D. Ore. 1972) (punitive interstate transfer requires due process procedures); United States *ex rel.* Neal v. Wolfe, 346 F. Supp. 569 (E.D. Pa. 1972) (administrative transfers free from constitutional challenge but disciplinary transfers require due process procedures).

Cases involving federal prisoners have been equally inconsistent. *Compare* United States *ex rel.* Gallagher v. Daggett, 326 F. Supp. 387 (D. Minn. 1971) (transfer to higher security prison presents no due process issue), *with* Walker v. Hughes, 375 F. Supp. 708 (E.D. Mich. 1974) (transfer to higher security prison requires due process safeguards). The last case to challenge the Federal Bureau of Prisons' disciplinary transfer policy, Robins v. Kleindienst, 383 F. Supp. 239 (D.D.C. 1974), was dismissed by stipulation when the Bureau adopted a new transfer policy requiring minimal procedures to accompany each punitive transfer. Bureau of Prisons Policy Statement 7400.5C, Inmate Discipline (November 4, 1974), since superceded by 7400.5D (July 7, 1975).

See generally Broude, *The Use of Involuntary Inter-prison Transfer as a Sanction*, 3 AM. J. CRIM. L. 117 (1974); Millemann & Millemann, *The Prisoner's Right to Stay Where He Is*,

issue apparently gave the Supreme Court little difficulty, as evidenced by the brief opinions in *Meachum* and *Montanye*. While its due process analysis was not wholly inconsistent with that of prior decisions, the Court did not consider many factors that had been recognized in earlier prisoners' rights cases.[9] Without critical discussion the Court rejected the reasoning of each court of appeals, both of which had thoroughly addressed state corrections law and federal decisional law. This Note will discuss the Supreme Court's rejection of the appeals court decisions and the Court's own analysis of the due process issue presented by them. It is concluded that the Court's resolution of *Meachum* and *Montanye* may signal a resumption of the traditional "hands off" doctrine—a policy of judicial abstention from reviewing prisoners' rights based upon the discretion allowed prison officials in dealing with inmates.

Due to the large number of prisoners transferred between penal institutions each year in this country,[10] the holdings assuredly will affect nearly every member of the nation's growing prison population, and the prison administration of every state as well. Although the full impact is difficult to foretell with certainty, prisoners' rights litigation is most likely to be affected by the Court's broad statements limiting the residuum of liberty retained by convicted persons. The refusal to expand the inmate bill of rights may mean, as Justice Stevens warned in his dissent in *Meachum*, that "the inmate's protected liberty interests are no greater than the State chooses to allow."[11]

I. PRISONERS AND THE DUE PROCESS CLAUSE

A. *Development of Prisoners' Rights*

While procedural due process guarantees for the defendant in the criminal justice system have developed through the years in a number of major Supreme Court decisions,[12] only in the last decade has the

3 CAP. U.L. REV. 223 (1974); Note, *Procedural Due Process in the Involuntary Transfer of Prisoners*, 60 VA. L. REV. 333 (1974) [hereinafter cited as Note, *Procedural Due Process*].

[9] *See* section III. A. *infra*.

[10] In 1970, 10,414 federal prisoners were transferred between institutions in the federal prison system. By comparison, in that same year 89,498 state prisoners were involved in interprison transfers. U.S. DEPT. OF JUSTICE, BUREAU OF PRISONS, NAT'L PRISONER STATISTICS BULL. NO. 47: PRISONERS IN STATE AND FEDERAL INSTITUTIONS FOR ADULT FELONS 6 (1972). In 1974, 18,641 inmates were transferred among state correctional facilities in New York state alone. Petitioner's Brief on Merits, Montanye v. Haymes, 96 S. Ct. 2543 (1976).

[11] 96 S. Ct. at 2542.

[12] *See, e.g., In re* Oliver, 333 U.S. 257 (1948) (right to public trial); Mapp v. Ohio, 367 U.S. 643 (1961) (right to exclusion at state trial of illegally seized evidence); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in felony cases); Malloy v. Hogan, 378 U.S. 1

Court dealt with the procedures due a criminal defendant after conviction and imprisonment.[13] The recognition of convicted persons' due process rights has been a recent development for several reasons. In the traditional view of American jurisprudence, the prisoner shed all of his protectable interests in liberty and property by due process of law.[14] The federal judiciary has made a slow retreat from this all-or-nothing position, on a case-by-case basis, by holding that some residual constitutional rights are retained by those convicted.[15] Yet state prisoners bringing constitutional challenges to prison practices have faced a federal judiciary reluctant to interfere with state prison administration—long considered wholly a state concern.[16] Because of the sensitive separation of power issue, federal and state courts alike

(1964) (right to be free of compelled self-incrimination); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront adverse witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Mempha v. Rhay, 389 U.S. 128 (1967) (right to counsel at deferred sentencing hearing after probation revocation).

[13] The rights of convicted persons are not coterminous with the rights of imprisoned persons. *Compare* Morrissey v. Brewer, 408 U.S. 471 (1972), *with* Wolff v. McDonnell, 418 U.S. 539 (1974). Convicted individuals may be currently unimprisoned, as in the case of parolees who have been conditionally released from incarceration and probationers who may have received probation in lieu of prison sentences. State law controls and defines these and other levels of custody after conviction. *See generally* H. KERPER & J. KERPER, LEGAL RIGHTS OF THE CONVICTED (1974). The major Supreme Court cases upholding constitutional rights for convicted persons are cited and discussed in section I.B. *infra*.

[14] As the view was expressed in one state court, the convicted felon "has, as a consequence of his crime, not only forfeited his liberty, but all of his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state." Ruffin v. Commonwealth, 62 Va. 790, 796 (1871). The view had relaxed somewhat some seventy years later. Price v. Johnston, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."); Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) ("the prisoner retains all rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law").

[15] *See, e.g.*, Howard v. Smyth, 365 F.2d 428, 431 (4th Cir. 1966); Landman v. Royster, 333 F. Supp. 621, 643 (E.D. Va. 1971). For substantive rights recognized under the due process clause, see Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971) (freedom of religion); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971), *aff'g* 309 F. Supp. 362 (E.D. Ark. 1970) (right to be free of cruel and unusual punishment); Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969) (right to adequate medical care); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970) (freedom of speech and association).

[16] *See* Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972); Quick v. Thompkins, 425 F.2d 260 (5th Cir. 1970); McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964); Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964); Stroud v. Swope, 187 F.2d 850 (9th Cir. 1951); Siegel v. Ragen, 180 F.2d 785 (7th Cir.), *cert. denied*, 339 U.S. 990 (1950); United States *ex rel.* Verde v. Case, 326 F. Supp. 701 (E.D. Pa. 1971). *See generally* Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969).

It should be noted that although the federal-state relationship is not implicated by the claims of federal prisoners, the federal judiciary has been no less reluctant to interfere with federal prison management. Federal-state comity simply represents an additional problem to state prisoners in securing complete review and effective remedies for their claims.

took a "hands off" approach to prisoners' litigation.[17]

At the federal level the historical attitude of the judiciary, that adjudicating prisoners' rights improperly intrudes upon the interests of prison administrations, has relaxed somewhat as the federal courts have recognized the paramount constitutional issues involved and their duty to protect the constitutional rights of all persons.[18] But, with some notable exceptions, the judicial approach to fashioning remedies has generally been a cautious one, requiring due process procedures in piecemeal fashion and ordering few changes in prison practices beyond those required in a specific set of circumstances.[19] Prison authorities appear more successful than other state officials in raising defenses such as lack of funds or administrative burdens.[20] They have succeeded in turning what otherwise might be damning criticism of their administrative abilities—*e.g.*, the disastrous prison riots of the early seventies—into a further argument for vesting more discretionary authority in the hands of prison management.[21] Even today the published opinions urge judicial restraint and warn against strait-jacketing prison authorities. Consequently, judicial hesitancy

[17] *See* Royal v. Clark, 447 F.2d 501 (5th Cir. 1971); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954) ("courts are without power to supervise prison administration or to interfere with ordinary prison rules or regulations"); Holland v. Oliver, 350 F. Supp. 485 (E.D. Va. 1972); United States *ex rel.* Yaris v. Shaughnessy, 112 F. Supp. 143 (S.D.N.Y. 1953) (recognizing the need for a middle ground between no judicial action and actual judicial control over prisons); Commonwealth *ex rel.* Smith v. Vanmiller, 194 Pa. Super. 566, 168 A.2d 793 (1961); Sellers v. State, 259 S.C. 564, 193 S.E.2d 513 (1972). *See generally* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

[18] Two courts early rejecting the "hands off" policy were Fulwood v. Clemmer, 295 F.2d 171 (D.C. Cir. 1961), and Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961). More recent cases include Cruz v. Beto, 405 U.S. 319, 321 (1972) ("Federal courts sit not to supervise prisons but to enforce constitutional rights of all 'persons,' including prisoners."); Johnson v. Avery, 393 U.S. 483, 486 (1969) (Administrations of state prisons "are subject to federal authority only where paramount federal constitutional or statutory rights supervene."); Urbano v. McCorkle, 334 F. Supp. 161, 167 (D.N.J. 1971), *aff'd*, 481 F.2d 1400 (3d Cir. 1973); Brenneman v. Madigan, 343 F. Supp. 128, 130-31 (N.D. Cal. 1972). *See generally* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971) [hereinafter cited as Note, *Decency and Fairness*].

[19] For innovative remedies see Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974) and cases therein cited at 340; Taylor v. Perini, 365 F. Supp. 557 (N.D. Ohio 1972); Jones v. Wittenberg, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzer, 456 F.2d 854 (6th Cir. 1972); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).

[20] *See* Note, *Decency and Fairness*, *supra* note 18, at 845-46.

[21] This is evident from the references in federal opinions to the distinct possibility of prison riots as a result of undermined prison authority. *See, e.g.*, Fano v. Meachum, 520 F.2d 374, 381 (1st Cir. 1975) (Campbell, J., dissenting), *rev'd*, 96 S. Ct. 2532 (1976); Haymes v. Montanye, 505 F.2d 977, 980 (2d Cir. 1974), *rev'd*, 96 S. Ct. 2543 (1976); McCray v. Sullivan, 399 F. Supp. 271, 275 (S.D. Ala. 1975).

to interfere with state prison control is still evidenced in the federal decisions.[22]

Another historically significant problem facing prisoners as litigants, from the standpoint of due process doctrine, is the now discredited "right-privilege" distinction. In a long line of cases the Supreme Court held that due process guarantees apply only to deprivation of "rights," and not to mere "privileges."[23] Traditionally, prisoners were stripped of their rights after conviction, leaving them only the enjoyment of privileges. Consequently, the courts dismissed prisoner claims on the theory that the state had no constitutional duty to protect the rightless plaintiffs by providing them due process of law.[24] State prison authorities could grant and withhold prisoner privileges on their own terms without judicial scrutiny. But now the Supreme Court has rejected the wooden distinction between rights and privileges,[25] and the existence of some residual constitutional rights of prisoners is undisputed. Prisoners are thus able to attack prison conditions and procedures alleged to deprive them of liberty or property interests without due process of law.[26]

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[22] *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 404 (1974) ("[T]he problems of prisons in America are complex and intractable, . . . they are not readily susceptible to resolution by decree."); Cruz v. Beto, 405 U.S. 319, 321 (1972) ("We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs."); Haymes v. Montanye, 505 F.2d 977, 980 (2d Cir. 1974), *rev'd*, 96 S. Ct. 2543 (1976) ("We certainly have no intention of unnecessarily placing prison officials in a strait jacket.") The Supreme Court's recent approach in *Procunier* and Wolff v. McDonnell, 418 U.S. 539 (1974), has been described as a "tentative toe-in-the-water." Note, *Backwash Benefits, supra* note 6, at 431.

On the matter of prison officials' response to judicial interference, see Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threat and Response*, 14 CRIME & DELINQ. 1 (1968). *See also* Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971) (prison administration pleading lack of funds in defense to prisoner action).

[23] *See, e.g.*, Barksy v. Board of Regents, 347 U.S. 442 (1954); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951); Hamilton v. Regents, 293 U.S. 245 (1934); Taylor v. Beckham, 178 U.S. 548 (1900); Crenshaw v. United States, 134 U.S. 99 (1890).

[24] *See, e.g.*, Ughbanks v. Armstrong, 208 U.S. 481, 487-88 (1908) (due process clause does not protect prisoner against deprivation of a state-granted privilege). *See generally* Note, *Prison Discipline, supra* note 6, at 919-25 & 934-39.

[25] *See* Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S. 535, 539 (1971); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963). *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442 (1968).

[26] While this Note discusses only the doctrine of procedural due process in the context of prisoners' rights, it should be recognized that some prisoner adjudications involving procedural rights may be characterized as enforcing substantive due process rights. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972). The dual characterization of such cases derives from the assertion in the case of a "procedural" right which is in effect the claim to a substantive right. The overlap between the two due process doctrines is succinctly explained in Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89, 93-94 nn.22-29 [hereinafter cited as Comment, *Entitlement*].

Judicial response to inmate litigation challenging the constitutionality of summary interprison transfers has paralleled the response to prisoners' suits challenging other incidents of prison life. In the past, transfer cases were almost universally dismissed, usually on the basis that inmates had no right to choose their places of confinement and that prison officials had the responsibility as well as the discretion to locate and transfer inmates as they saw fit.[27] More recent decisions in the lower federal courts have rejected this approach and held instead that the due process clause guarantees inmates notice and an opportunity for a hearing prior to, or soon after, involuntary transfers.[28] That legal about-face was no doubt influenced by the abundant legal commentary on the issue, the consensus of which argued for constitutional protection for involuntarily transferred prisoners.[29] The receptiveness of the federal courts to those arguments was due in large measure, however, to the expanding activity of the United States Supreme Court in the development of convicted persons' and prisoners' rights, the subject to which this Note now turns.

B. *Prisoners' Rights Before The Supreme Court*

Initial Supreme Court decisions upholding prisoners' claims protected their rights under explicit constitutional provisions. Prisoners

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Other courts have used the eighth amendment's prohibition of cruel and unusual punishment to invalidate prison conditions since it applies to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962). *See, e.g.*, McCray v. Sullivan, 509 F.2d 1332 (5th Cir. 1975), *on remand*, 399 F. Supp. 271 (S.D. Ala. 1975); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971), *aff'g* 309 F. Supp. 362 (E.D. Ark. 1970). *But see* Gomes v. Travisono, 490 F.2d 1209 (1st Cir. 1973) (rejecting eighth amendment challenge to summary interstate transfer of state prisoners to other state and federal prisons). *See generally* Note, *Decency and Fairness*, *supra* note 18, at 848-64.

For the application of the fourteenth amendment's equal protection clause to prison transfers, see Duncan v. Madigan, 278 F.2d 695 (9th Cir. 1960), *cert. denied*, 366 U.S. 919 (1961) (rejecting fourteenth amendment challenge to interstate transfer).

[27] *See, e.g.*, Hillen v. Director, 455 F.2d 510 (9th Cir.), *cert. denied*, 409 U.S. 989 (1972); Holland v. Ciccone, 386 F.2d 825 (8th Cir. 1967); Lawrence v. Willingham, 373 F.2d 731 (10th Cir. 1967); King v. Norton, 336 F. Supp. 255 (D. Conn. 1972). Transfer to an institution offering substantially worse conditions of confinement did not change the analysis. United States *ex rel.* Stuart v. Yeager, 293 F. Supp. 1079 (D.N.J. 1968); Lewis v. Gladden, 230 F. Supp. 786 (D. Ore. 1964). *But see* Keliher v. Mitchell, 250 F. 904 (D. Mass. 1916) (invalidating interstate transfer of youthful inmate on ground of gross abuse of discretion).

[28] *See, e.g.*, Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972); Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971), *aff'd*, 481 F.2d 1400 (3d Cir. 1973); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971); United States *ex rel.* Gallagher v. Daggett, 326 F. Supp. 387 (D. Minn. 1971).

[29] *See, e.g.*, Broude, *supra* note 8; Millemann, *supra* note 8; Note, *Prison Discipline*, *supra* note 6, at 938-44; Note, *Procedural Due Process*, *supra* note 8; Case Note, 9 U. RICH. L. REV. 345 (1975).

were held to enjoy the right of access to the courts,[30] substantial religious freedom,[31] and the exercise of other first amendment freedoms.[32] The Supreme Court also held that prisoners are protected from racial discrimination under the equal protection clause of the fourteenth amendment.[33] It thus came to be understood that fewer rights were shed at the prison door than had previously been thought, and with that understanding came judicial recognition that fewer restrictions on prisoners' liberty are actually necessary to meet the objectives of the penal system. But the ability of prisoners to claim the protection of the due process clause has not been without qualification—prisoners' rights are still limited by restrictions imposed upon them by the nature of the penal system.[34]

The application of due process to prisoners' rights began in the 1971 Term when the Supreme Court for the first time held that prisoners could challenge certain changes in the conditions of their confinement under the due process clause. In *Haines v. Kerner*[35] a state prisoner asserted under the Civil Rights Act of 1871 a denial of due process in prison disciplinary proceedings that led to solitary confinement and personal injuries. The Court, in reversing the lower court's dismissal of the prisoner's complaint for failure to allege deprivation of federally protected rights, held that the inmate must be given an opportunity to offer proof of his claim.

In 1972 the Court greatly expanded the scale of convicted persons' protected interests in liberty in *Morrissey v. Brewer*.[36] The plaintiffs in *Morrissey* were parolees who alleged violation of due

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[30] Younger v. Gilmore, 404 U.S. 15 (1971); Johnson v. Avery, 393 U.S. 483 (1969); *Ex parte* Hull, 312 U.S. 546 (1941).

[31] Cruz v. Beto, 405 U.S. 319 (1972); Cooper v. Pate, 378 U.S. 546 (1964).

[32] Procunier v. Martinez, 416 U.S. 396 (1974) (invalidating prison mail censorship regulations on first amendment grounds); Sostre v. McGinnis, 442 F.2d 178 (3d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972). *See also* Younger v. Gilmore, 404 U.S. 15 (1971) (invalidating state prison regulation establishing highly restrictive book list for prison law library). *But cf.* Pell v. Procunier, 417 U.S. 817 (1974) (first amendment challenge to prohibition of newsmen's interviews with prisoners rejected).

[33] Lee v. Washington, 390 U.S. 333 (1968).

[34] *See* Wolff v. McDonnell, 418 U.S. 539, 556 (1971); Haines v. Kerner, 404 U.S. 519 (1972); Wilwording v. Swenson, 404 U.S. 249 (1971); Screws v. United States, 325 U.S. 91 (1945). *Cf. In re* Harrell, 2 Cal. 3d 675, 686, 470 P.2d 640, 646, 87 Cal. Rptr. 504, 510 (1970), *cert. denied*, 401 U.S. 914 (1971) (prisoners have right to legal assistance from inmates in same institution, but no right to correspond with prisoners elsewhere).

[35] 404 U.S. 519 (1971). The use of due process by the lower courts before *Haines* is reviewed in Note, *Decency and Fairness*, *supra* note 18, at 864-71.

[36] 408 U.S. 471 (1972). It should be noted, however, that in the same term the Court refused to review two cases that posed eighth amendment challenges to prison conditions. Sellars v. Beto, 409 U.S. 968, 968 (1972) (Justice Douglas, dissenting, noted the "shockingly primitive conditions" of solitary confinement alleged by the appellants); McLamore v. South Carolina, 409 U.S. 934 (1972) (indiscriminate use of prison chain gangs).

process rights when their paroles were revoked without notice or hearing. The Court upheld the claim and set forth the procedural safeguards required by the due process clause in this context.[37] As stated in the Court's opinion,

> the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee. . . . [T]he liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.[38]

The Court conceded that the state was not compelled to provide prisoners the opportunity for parole, but having created that opportunity and conferred conditional liberty upon the parolees, the state could not deprive them of that valuable liberty interest without prior notice and an opportunity to be heard. This same rationale was used one year later in *Gagnon v. Scarpelli*[39] when the Court expanded its *Morrissey* holding to reach the revocation of probation.

Dealing next with the rights of imprisoned convicted persons, the Supreme Court in its 1973 Term unanimously invalidated a set of restrictive prison mail censorship regulations in *Procunier v. Martinez*.[40] That decision vindicated prisoners' first amendment rights, but the Court relied heavily on the infringement of their corre-

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[37] The Court noted that parole revocation was not a part of a criminal prosecution and therefore the full panoply of trial-type procedures did not apply. To decide what procedures would be due the parolees, the Court used the balancing of interests technique associated with due process adjudication and weighed the nature of the parolees' interest in conditional liberty with the state's competing interest in protecting the citizenry and rehabilitating its inmates. 408 U.S. at 480-90. *See generally* Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

The *Morrissey* majority then detailed the minimum requirements for due process—a preliminary informal hearing to determine whether there was probable cause to believe a parole violation occurred and a more formal evidentiary hearing prior to a final revocation decision to determine whether the facts warranted parole revocation. The minimum requirements of the final hearing included written notice of the claimed parole violation, disclosure of the evidence against the parolee, the opportunity to testify in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses in most cases, a "neutral and detached" fact-finding panel, and a written statement relating the evidence relied on and the reasons for the hearing body's decision. The Court declined to decide if the indigent parolee was entitled to retained or appointed counsel. *Id.* at 489.

[38] 408 U.S. at 482.

[39] 411 U.S. 778 (1973). The *Gagnon* Court applied the *Morrissey* procedures, outlined in note 37 *supra*, to the revocation of probation and reached the right to counsel issue deferred in the *Morrissey* opinion. The Court refused to establish a new constitutional rule requiring that counsel be allowed at all probation hearings. It preferred a case-by-case approach and identified the functional considerations, *i.e.*, whether the nature of the disputed issues or the inability of the probationer to express himself adequately would make assistance of counsel particularly useful, to guide courts and prison officials in determining the necessity for counsel in future cases. *Id.* at 787-91.

[40] 416 U.S. 396 (1974).

spondents' free speech rights which the prison regulations represented. The Court's indirect approach to the inmates' rights at issue, combined with the opinion's lengthy apologetic discourse on the judiciary's reluctant interference with prison administration, created some concern in the legal commentary that the "hands off" approach towards prisoners' rights had not been forgotten.[41]

Another important decision of the same term, *Wolff v. McDonnell*,[42] was received with the same cautious optimism. In *Wolff*, some but not all of the due process procedures enunciated in *Morrissey* and *Scarpelli*[43] were applied to prison disciplinary hearings that might result in certain serious punishments. The decision demonstrated the Court's willingness to sanction judicial involvement in prison procedures, but the Court's deference to prison authorities in requiring only minimal procedural guarantees for the inmates made unclear the extent to which the Court was willing to intervene in internal prison affairs.[44]

The prisoner in *Wolff* alleged that the state cancelled his earned good time credit—credit against the inmate's prison term statutorily given for good conduct—by disciplinary actions that did not provide adequate due process procedures. By statute the state reserved loss of good time credits and solitary confinement as sanctions for serious misconduct, but the only statutory provisions establishing procedures for impositions of the sanctions merely required that the inmate be "consulted regarding the charges of misconduct."[45] The Court rejected the state's argument that disciplinary procedures were a matter of state policy wholly within its administrative authority over prisons and therefore outside the protection of the due process clause. The *Wolff* Court conceded that the Constitution did not require the state to extend good time credit to its prisoners, but since the state created the right and recognized its deprivation as a serious sanction for major misconduct, "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him" to limited due process protection.[46]

Although the prisoner's complaint had challenged only the procedures employed in deprivation of good time credit, the Court in *Wolff* extended due process protection to the imposition of solitary confinement as well. That sanction merited procedural safeguards

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[41] *See, e.g.*, Note, *Backwash Benefits*, *supra* note 6, at 411.
[42] 418 U.S. 539 (1974).
[43] *See* note 37 & 39 *supra*.
[44] *See* Note, *Backwash Benefits*, *supra* note 6, at 411-31.
[45] 418 U.S. at 548.
[46] *Id.* at 557.

because it represented "a major change in the conditions of confinement" and was normally imposed only for serious misconduct.[47] The Court carefully limited its conclusion, however, explaining that the due process procedures afforded these two punishments would not necessarily be required when "lesser penalties such as the loss of privileges" were imposed on a prisoner.[48]

II. DECISIONS IN *Meachum* AND *Montanye*

The foregoing progression of Supreme Court decisions expanding the scope of the due process clause to cover the claims of convicted persons—prisoners, as well as probationers and parolees—led many of the lower federal courts to apply the clause to interprison transfers.[49] These courts took what appeared to be reasonable readings of the Supreme Court's opinions, including in particular its *Wolff v. McDonnell* decision, and found that summary transfers adversely affected inmate "liberty" within the meaning of the due process clause. The contrary conclusion in *Meachum* and *Montanye* that prisoner transfers do not implicate due process protection seems to mark a shift in the Court's approach towards adjudicating the rights of convicted persons.

A. *Meachum v. Fano*

Prompted by nine serious fires during a short period at the Massachusetts Correctional Institution at Norfolk, a medium security prison, officials began reclassification proceedings on six inmates believed to have been involved in this and other disorders.[50] Each was notified of the classification hearing at which the officials would consider whether the inmate should be transferred to another institution, and was given a copy of the disciplinary charges against him. Each inmate was present with counsel at the individual hearings, but the classification board alone heard the testimony against the prisoners. Each was allowed to present evidence in his own behalf, but was denied a transcript or summary of the testimony against him. After review of the board's recommendations by higher prison officials, all six inmates were ordered transferred to maximum security prisons within the state correctional system.

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[47] *Id.* at 571 n.19. *But see* Meachum v. Fano, 96 S. Ct. 2532, 2538-39 (1976).

[48] The Court reiterated that warning in Baxter v. Palmigiano, 96 S. Ct. 1551, 1560 (1976), but declined to consider the due process implications of such "lesser penalties."

[49] *See* note 126 *infra*.

[50] The following facts are taken from the Court's opinion. 96 S. Ct. 2532, 2534-37. *See also* Fano v. Meachum, 520 F.2d 374, 376-77 (1st Cir. 1975).

The inmates commenced a civil rights action under 42 U.S.C. § 1983[51] alleging that transfer to a less favorable institution without an adequate fact-finding hearing was a deprivation of liberty without due process of law.[52] The prisoners sought damages, declaratory relief, and an injunction setting aside the transfers. Relying upon *Wolff v. McDonnell*,[53] the United States District Court for Massachusetts found that the notice and hearing procedures employed in the transfers had been constitutionally inadequate, and enjoined the transfers until further hearings could be held. The district court ordered promulgation of procedures to be followed in future classification hearings involving prisoner transfers, and directed that the procedures due the transferred inmates of the medium security Norfolk prison should be established by looking to the due process procedures currently used in disciplinary hearings at Walpole, a maximum security institution targeted to receive some of the transferred inmates.[54]

The Court of Appeals for the First Circuit affirmed the district court's due process holding and its determination of procedural requirements.[55] The First Circuit relied on its prior decision in *Gomes v. Travisono*,[56] which had held on a broad reading of *Wolff*[57] that the deprivations inherent in the interstate transfer of prisoners were sufficient to trigger certain minimal due process safeguards even outside the context of official disciplinary proceedings. In *Meachum* the First Circuit expanded its *Gomes* holding to reach the intrastate transfer of prisoners, again relying upon a broad interpretation of *Wolff*.[58] The intrastate transfers at issue in *Meachum*—from a medium security prison to a maximum security prison only one mile away—represented "not a simple loss of privileges" but, as *Wolff* required, "a significant modification of the overall conditions of confinement."[59] Therefore, the inmates' interests were held to fall within

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[51] Civil Rights Act of 1871, § 1:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action of law, suit in equity, or other proper proceeding for redress.

[52] Fano v. Meachum, 387 F. Supp. 664 (D. Mass. 1975).

[53] 418 U.S. 539 (1974). *See* text accompanying notes 42-48 *supra*.

[54] 387 F. Supp. at 668-69.

[55] Fano v. Meachum, 520 F.2d 374 (1st Cir. 1975).

[56] Gomes v. Travisono, 510 F.2d 537 (1st Cir. 1974), on remand after vacation of the First Circuit's original decision in light of Wolff v. McDonnell.

[57] 418 U.S. 539 (1974).

[58] The nature of the First Circuit's interpretation of *Wolff* is discussed at text accompanying note 117 *infra*.

[59] 520 F.2d at 378. The Supreme Court in *Meachum* appears to implicitly reject that reading of *Wolff*. *See* text accompanying notes 120-25 *infra*.

that "liberty" protected by the due process clause under the *Wolff* standard.

The dissenting opinion to the First Circuit's *Meachum* decision foreshadowed the United States Supreme Court's subsequent resolution.[60] The dissent denied that a prisoner's interest in remaining in one institution rather than another was a species of property or liberty protected by the fourteenth amendment. Massachusetts had not conferred a statutory right upon inmates to be placed or remain at a particular state prison; thus the decision in *Wolff*, which was based on prisoners' rights created by state law, did not support the prisoners' challenge here. The dissent argued for a different analysis of the due process issue: "[I]n defining a prisoner's 'liberty' interest, one must ask not only whether a particular event may cause loss to the prisoner but whether one in his position has any claim to what was taken away."[61] The dissent concluded that the state, not its convicted wards, had the exclusive right to decide where within its penal system prisoners were to be lodged.

In the Supreme Court opinion Justice White, writing for a six-member majority, posed the threshold question to the constitutional issue—whether the transfers infringed a liberty interest of the prisoners within the meaning of the due process clause.[62] Holding that it did not, the Court rejected the reasoning of the court of appeals that "*any* grievous loss" or "*any* change in the condition of confinement having a substantial adverse impact on the prisoner" is sufficient to invoke the procedural protection of the due process clause.[63] The determining factor is, as the Court has often pointed out in due process opinions, "the nature of the interest involved rather than its weight."[64]

The Court distinguished the protection of liberty that the clause provided "by its own force"—the prohibition of state convictions depriving persons of liberty without full compliance with due process of law—and the protection of liberty *after* conviction which is a "statutory creation of the State."[65] After a valid conviction a prisoner's liberty interest is "sufficiently extinguished . . . to empower

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[60] 520 F.2d at 380.

[61] *Id.* at 381.

[62] 96 S. Ct. at 2534. Due process adjudication involves two analytically distinct issues: whether the right to due process is applicable; and, if that threshold question is answered affirmatively, what procedures must be provided. Courts have not always made this distinction. *See* Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975); Comment, *Entitlement*, *supra* note 26, at 120.

[63] 96 S. Ct. at 2538 (emphasis in original).

[64] *Id. See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[65] 96 S. Ct. at 2539 (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).

the State to confine him to *any* of its prisons."[66] Using *Wolff v. McDonnell*[67] as an example, the Court confirmed that the due process clause also protected liberty interests having "roots in state law."[68] Due process in *Wolff* required minimum procedures to insure that the prisoners' state-created right to earn good time credits was not arbitrarily abrogated by summary action of the state. In the case before it, however, Massachusetts law conferred no right upon its prisoners to remain in a particular prison and did not condition transfers upon misconduct or other specified events.[69] The Court concluded: "The predicate for invoking the protection of the Fourteenth Amendment as construed and applied in *Wolff v. McDonnell* is totally nonexistent in this case."[70]

The opinion then turned to the prisoners' arguments, made by analogy to the disciplinary proceedings at issue in *Wolff*,[71] that since disciplinary charges initiate and influence the transfer decision, hearings should be required before transfer to protect inmates from dislocation based on misinformation and erroneous allegations of misconduct. The Court rejected the argument, again pointing to the discretion given state prison officials under Massachusetts law to transfer prisoners "for whatever reason or for no reason at all."[72] Because of that discretion under state law, the prisoners' expectation of remaining in the medium security Norfolk prison was "too ephemeral and insubstantial to trigger procedural due process protections."[73]

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[66] 96 S. Ct. at 2538 (emphasis in original). This seems an overly broad statement in that it presumes state prisons afford conditions of imprisonment above constitutional reproach in all cases. Two federal courts of appeals, however, have found conditions in particular state prisons to represent cruel and unusual punishment in violation of the eighth amendment. *See* McCray v. Sullivan, 509 F.2d 1332 (5th Cir.), *on remand*, 399 F. Supp. 271 (S.D. Ala. 1975); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971), *aff'g* 309 F. Supp. 362 (E.D. Ark. 1970).

[67] 418 U.S. 539.

[68] 96 S. Ct. at 2539.

[69] The relevant provisions of Massachusetts law are set forth in the Court's opinion. 96 S. Ct. at 2539 n.7.

[70] 96 S. Ct. at 2539.

[71] The *Wolff* facts are recounted at 418 U.S. 539, 545-53 (1974).

[72] 96 S. Ct. at 2540. There can be no dispute with the Court's observation—on its face the state transfer statute conferred unqualified discretion upon prison management to transfer the state's prisoners. But it is rather surprising that the Court did not qualify its reading of the statute by noting that although the state may act for any number of reasons, there are some reasons upon which the state may not rely. The state surely could not punish a person for exercising his first amendment rights of speech and religion, for example. *See* O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443, 444 (1966); Van Alstyne, *supra* note 25, at 1445-51. Indeed, a due process issue may be raised if it can be proved that the state truly acted for "no reason at all." *See* text accompanying notes 124-25 *infra*.

Note that the Court did not address the prisoner's claim in *Montanye* that the state transferred him in retaliation for his exercise of his constitutional rights under the first and sixth amendments. *See* text accompanying notes 97-98 *infra*.

[73] 96 S. Ct. at 2540.

Closing the opinion, Justice White expressed the Court's policy considerations in limiting the scope of due process protection in this case. To do otherwise would "place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges."[74] The states are free to mandate pretransfer hearings as they wish, Justice White noted, but the Court will not apply the due process clause to impose them on the nation's prisons.

In the dissenting opinion by Justice Stevens, in which Justices Brennan and Marshall joined,[75] the Court's holding was challenged as resting on a "fundamentally incorrect" conception of liberty. Under the majority's constitutional analysis a liberty may either "originate in the Constitution" or have "its roots in state law."[76] The dissent philosophically argued that if man were a "creature of the State," that analysis would be proper, but since "all men were endowed by their Creator with liberty as one of the cardinal inalienable rights" creating the "basic freedom" protected by the due process clause,[77] neither the Constitution nor laws of the states "create" the liberty protected by the clause.

The dissent traced the development of the notion that even convicted persons retain some constitutionally protected liberty after conviction and incarceration. The *Meachum* decision, however, reduced the analysis developed in earlier prisoners' rights cases to the truism: "[T]he inmate's protected liberty interests are no greater than the State chooses to allow."[78] The dissent recognized that if this alone is the extent of a prisoner's liberty interests, then he is once again "the slave of the state,"[79] as last century's judicial opinions were wont to describe him.

The liberty excluded by the Court in the dissent's view was "at the very minimum the right to be treated with dignity—which the Constitution may never ignore."[80] The opinion closed by indicating that the dissenting Justices would adopt the "grievous loss" analysis followed by the First Circuit to protect inmate liberty infringed by summary state action.[81]

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[74] *Id.* This section of the *Meachum* decision is discussed in the text accompanying notes 166-72 *infra.*

[75] 96 S. Ct. at 2540-43.

[76] *Id.* at 2541 (quoting the majority opinion at 2539).

[77] *Id.* at 2541.

[78] *Id.* at 2542. This Note argues below that the dissent properly summarizes the effect, if not the intent, of the Court's decisions in *Meachum* and *Montanye. See* section III.C. *infra.*

[79] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

[80] 96 S. Ct. at 2542. The dissent later added to its list of a prisoner's protected interests "the right to pursue his limited rehabilitative goals." *Id.* at 2543.

[81] *See* text accompanying notes 59 & 64 *supra.*

B. *Montanye v. Haymes*

Haymes was an inmate of the Attica Correctional Facility, a maximum security prison in New York State. In June 1972 he was discharged from his job as an inmate law clerk in the prison law library.[82] On prior occasions Haymes had been warned about giving legal assistance in violation of established prison regulations. Later the same day prison authorities took from Haymes a letter in petition form addressed to a district court judge, which he was circulating among inmates for their signatures. The letter complained that the dismissal of Haymes and others from the library had deprived the signatories of legal assistance and access to the courts.[83] The confiscation of Haymes' petition was based on prison rule number 21: "Inmates are prohibited except upon approval of the warden, to assist other inmates in the preparation of legal papers."[84] Haymes was not disciplined after the incident, but two days later he was summarily transferred to another maximum security prison in the New York correctional system.

Haymes commenced a civil rights action under 42 U.S.C. § 1983 seeking damages for confiscation of his petition and for his allegedly punitive transfer without notice or hearing.[85] His *pro se* complaint[86] alleged that his transfer was in retaliation for disobedience of the legal assistance rule and deprived him of due process of law. The United States District Court for the Western District of New York granted summary judgment to defendants Montanye and Smith, Attica prison superintendents, holding that Haymes' legal petition was in contravention of prison rules and that its confiscation by defendants was proper.[87] The district court found no due process violation in the transfer because Haymes made no claim that the facility to which he was transferred provided harsher or substantially different conditions than those of the Attica prison. In its summary rejection of the issue the court did not consider whether an interest protected by due process was involved.

The Court of Appeals for the Second Circuit saw error in the

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[82] The following facts are taken from the Court's opinion. 96 S. Ct. at 2544-47. *See also* 505 F.2d 977, 977-78 (2d Cir. 1974).

[83] Johnson v. Avery, 393 U.S. 483 (1969), approved "jailhouse lawyers" and invalidated a state prison regulation prohibiting them as a restriction burdening prisoners' right of access to the courts.

[84] 505 F.2d at 978.

[85] Haymes v. Montanye, No. 1972-410, (W.D. N.Y. 1973) (unreported).

[86] Haymes later retained counsel. His case before the Supreme Court was sponsored by The American Civil Liberties Union National Prison Project, Washington, D.C.

[87] Haymes v. Montanye, No. 1972-410, (W.D. N.Y. 1973) (unreported).

district court's analysis of the due process claim and reversed.[88] The court found two genuine issues of material fact to preclude summary judgment: (1) whether Haymes was transferred as punishment, and (2) whether the effects of the transfer were sufficiently harsh to make denial of a hearing a violation of due process. The court refused to look upon the circumstances of his transfer as a "mere coincidence."[89] It conceded that purely administrative transfers would require no due process protection, but argued that for a transfer intended as punishment, "elementary fairness" demands an opportunity for a hearing because "the specific facts upon which a decision to punish are predicated can most suitably be ascertained at an impartial hearing to review the evidence of the alleged misbehavior . . . ."[90] The court cited *Wolff v. McDonnell* for this proposition, but did not treat the due process issue as being governed by the *Wolff* holding.

The Second Circuit based its holding squarely on New York statutory law.[91] It noted that prison regulations promulgated under state corrections law required some form of hearing before an inmate could be subjected to punitive sanctions for prison misconduct. A punitive transfer imposed without the required disciplinary procedures might amount to a denial of due process; therefore Haymes must be allowed to show the causal connection between his misconduct and the transfer. The court acknowledged New York's statutory authority for transfer of inmates, but noted: "[I]t would be anomalous indeed, 'both from a due process and an equal protection point of view, if the prison authorities could accomplish by transfer a procedure-free punishment which they could not accomplish within their own walls.' "[92]

The Supreme Court decision in *Montanye* was again written by Justice White for the six justices who comprised the majority in the *Meachum* decision delivered earlier the same day. After reciting the facts and summarizing the legal theory of the Second Circuit's decision, the Court held that *Meachum v. Fano* required its reversal.[93]

The Court recognized that the Second Circuit had narrowed its holding to require due process procedures only for transfers made for

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[88] 505 F.2d 977 (2d Cir. 1974).

[89] *Id.* at 979. The Second Circuit expressed its suspicions: "[W]e are not too myopic to notice the distinct possibility of arbitrary, misguided, or disingenuous invocation of administrative justifications for transfer. . . . [T]he individual inmate is not left unprotected against such abuses." *Id.* at 980 n.4.

[90] *Id.* at 980.

[91] N.Y. CORREC. LAW §§ 112, 137 (McKinney Supp. 1974).

[92] 505 F.2d at 981 (quoting Gomes v. Travisono, 490 F.2d 1209, 1215 (1st Cir. 1973)).

[93] 96 S. Ct. at 2547.

punitive reasons and, unlike the First Circuit in *Meachum*, had not applied due process to all disadvantageous transfers regardless of motive. Still, the *Meachum* holding controlled *Montanye v. Haymes* because the predicate for invoking due process procedures—"some right or justifiable expectation rooted in state law"—was, as in *Meachum* itself, wholly nonexistent.[94] The due process clause "by its own force" did not require pretransfer hearings even though the transfer was motivated by the inmate's breach of prison rules. Like the Massachusetts statute in *Meachum*, the New York corrections law[95] did not condition inmate transfer on misconduct or other specific events, but vested discretionary power in prison officials to transfer inmates for any reason. Therefore, the Court held, Haymes had no right or reasonable expectation to remain in any particular prison facility which required procedural safeguards under the due process clause.[96]

Again Justice Stevens, joined by Justices Brennan and Marshall, dissented in *Montanye*.[97] The basis for the dissent was, however, limited to the majority's failure to address inmate Haymes' second constitutional claim—that he had been punished for circulating a petition communicating with a court and for giving legal assistance to other inmates.[98] The dissent argued that a trial was necessary on that claim to determine if Haymes was transferred in retaliation for exercise of his first amendment rights. Although he would agree that the motive for Haymes' transfer was irrelevant to the due process claim, Justice Stevens noted that the state's motive becomes critical if, as charged, it transferred Haymes to suppress his exercise of constitutional rights. The dissent said that, due to the Court's silence on the issue, it assumed that trial may be ordered by the court of appeals on remand.

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[94] *Id.*

[95] N.Y. CORREC. LAW § 23 (McKinney Supp. 1974). The statute is set forth in the Second Circuit's opinion, 505 F.2d at 981 n.6. The court noted that no implementing regulations had been promulgated by state officials "governing the proper occasions for transfers" or establishing procedures to be used. *Id.*

[96] 96 S. Ct. at 2547.

[97] *Id.* at 2548.

[98] The Supreme Court did not have that issue squarely before it. The district court judgment in *Haymes v. Montanye* dismissed the inmate's claim on the grounds that seizure of his petition was proper under prison rules and implicated no constitutional provisions. *See* note 84 *supra* & accompanying text. The second circuit did not reach that issue in reversing the lower court's dismissal. 505 F.2d at 982. As a result the state's appeal of the circuit court's judgment was based solely upon its disposition of the transfer due process claim. Petitioner's Brief on Certiorari, Montanye v. Haymes, 96 S. Ct. 2543 (1976).

III. ANALYSIS OF THE *Meachum* AND *Montanye* DECISIONS

A. *Restrictive Interpretation of the Due Process Clause*

In concluding its due process analysis in *Meachum v. Fano*, the Supreme Court defended its approach to the constitutional issue presented as consistent with that of earlier due process adjudications, citing *Goss v. Lopez*,[99] *Board of Regents v. Roth*,[100] *Perry v. Sinderman*,[101] and *Goldberg v. Kelly*.[102] As a broad statement, this is arguably correct. Under the procedural due process doctrine applied in those cases, the plaintiff was required to demonstrate that the state had invaded a "protected interest" in liberty or property to present a valid due process claim.[103] It would not be enough that the plaintiff wanted something or had developed a "unilateral expectation" of it.[104] Showing a "grievous loss" in itself is not sufficient; the loss must be to an interest properly characterized as an interest in "liberty" or in "property" as those words are used in the due process clause.[105] As reiterated in *Meachum*, to determine if an interest is within the fourteenth amendment's protection the Court looks to the "nature of the interest at stake and not to its weight."[106] The common thread running through the four cases cited in *Meachum* and *Montanye* is that the "nature" of the interest must lie in state law or practice.[107] The plaintiffs in those cases proved, or offered to prove, the existence of an interest created by the state, the loss of which by summary state action was sufficiently serious to trigger the procedural protections of due process. Accordingly, the prisoners in *Meachum* and *Montanye* were unsuccessful in their due process claims because they could not point to a state law or regulation that explicitly granted them the right to remain in their respective prisons or provided for notice and the opportunity for a hearing in connection with their transfers.[108]

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[99] 419 U.S. 565 (1975).

[100] 408 U.S. 564 (1972).

[101] 408 U.S. 593 (1972).

[102] 397 U.S. 254 (1970).

[103] Arnett v. Kennedy, 416 U.S. 134, 164-65 (1974). *See* Comment, *Entitlement*, *supra* note 26, at 92-98.

[104] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[105] Goss v. Lopez, 419 U.S. 565, 574 (1975).

[106] *Id.* at 575-76; Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

[107] *See, e.g.*, Perry v. Sinderman, 408 U.S. 593, 603-04 (1972) (Burger, C.J., concurring) ("[W]hether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law.")

[108] As the Court explained in *Montanye*, "there is no more basis in New York law for invoking the protctions of the Due Process Clause than we found to be the case under Massachusetts law in the *Meachum* case." 96 S. Ct. at 2547.

The Court's legal theory, often called the "entitlement doctrine,"[109] was originally developed in cases seeking to establish an interest in property.[110] The doctrine has received an analogous use in prisoner litigation seeking to show a protected interest in liberty.[111] In both *Morrissey v. Brewer*[112] and *Wolff v. McDonnell*,[113] for example, the Court relied on state corrections statutes creating a prisoner benefit which the Court perceived as conferring a degree of liberty on the prisoners. The surprising conclusion apparently reached by the Court in *Meachum* and *Montanye* is that state law or practice[114] is the *exclusive* source of prisoners' liberty interests.

Apart from the implications this conclusion has on the meaning of conviction and the extent of the constitutional liberty removed by conviction,[115] the Court's analysis signifies a more restrictive reading of the due process clause and establishes a stricter standard for its application. Only future cases will prove whether this assessment bears true in due process cases in general or only in those cases involving the rights of convicted persons.[116] Its validity for the latter

[109] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Goldberg v. Kelly, 397 U.S. 254, 262 & n.8 (1970); Comment, *Entitlement, supra* note 26.

[110] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (Welfare benefits "are a matter of statutory entitlement for persons qualified to receive them."); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[111] The Court explicitly recognized its dual use of the entitlement doctrine to show property interests of free citizens and to show liberty interests of convicted persons in Wolff v. McDonnell, 418 U.S. 539, 577 (1974). *Compare* Sands v. Wainwright, 357 F. Supp. 1062, 1079 (M.D. Fla. 1973) (prisoners' rights viewed as property interests—once a privilege is granted the inmate is entitled to it, thus constitutional protections apply), *with* Landman v. Royster, 333 F. Supp. 621, 644 (E.D. Va. 1971) (prisoners' rights viewed solely as interests in liberty). Nonprisoners are not generally thought to need statutory entitlements to have constitutionally protected liberty. *See, e.g.*, the discussion of Justice Stevens' philosophy of the source of constitutional "liberty" in the text accompanying notes 75-77 *supra*.

[112] 408 U.S. 471, 482 (1972).

[113] 418 U.S. 539, 577 (1974).

[114] "State law or practice" as used hereinafter refers collectively to state corrections statutes and any rules or regulations promulgated thereunder. The term "state practice" may include as well certain unformalized practices customarily followed by its prison administrators which have developed through time and experience. As the discussion below indicates, the significance of these less formal prison practices to establishing inmates' rights and expectations protected by the due process clause is unclear. *See* section III.A.1. *infra*.

[115] *See* section III.C. *infra*.

[116] The entitlement doctrine discussed above is used by the Court in cases involving persons within and without the criminal justice system, and its application does not appear to vary markedly between the two. That conclusion is, of course, based on consideration of only the few cases involving convicted persons that have reached the Supreme Court contrasted to the much larger number of cases involving the nonconvicted. The fact that the Court often cites the former cases within due process opinions involving the latter, and vice versa, indicates the Court considers the same analysis is at work in both. Once the Court has determined that due process applies and proceeds to consider what procedural incidents are due, however, the similarity ends. The Court uses stricter standards when mandating use of a particular procedure

group is supported, however, by a survey of the due process arguments rejected by the Supreme Court in reaching its decisions in *Meachum* and *Montanye*.

1. The First Circuit's Analysis in *Meachum*

In *Meachum* the Court of Appeals for the First Circuit understood the Supreme Court in *Wolff v. McDonnell* to perceive a liberty interest in the forefeiture of state-created good time credit and, in addition, a liberty interest infringed by the "significant modification of the overall conditions of . . . confinement."[117] Convinced that prison transfer imposes serious adverse changes to the conditions of prisoner confinement (analogous to the imposition of solitary confinement), the First Circuit held that such transfers affect inmate liberty as protected by the fourteenth amendment.[118] Acknowledging that the state was under no obligation to provide prisons of different security levels, the court bolstered its conclusion by analogizing confinement in the more desirable medium security prison to the state-created right to good time involved in *Wolff*. The advantageous confinement, once granted, could not be withdrawn by transfer to the less desirable maximum security prison without procedural safeguards comporting with due process.[119]

The Supreme Court in both *Meachum* and *Montanye* generalized the First Circuit's holding as extending due process to "any grievous loss" or "any change" substantially adverse to a prisoner's condition of confinement.[120] The Court did not explain the lower court's error in reading *Wolff v. McDonnell*. It instead described *Wolff* as entitling prisoners to due process protections against deprivation of good time credit when the state had created a liberty interest by providing in state law a right to earn good time.[121] Surprisingly, the Court did not acknowledge that *Wolff* also extended due process protection to prisoners threatened with imposition of solitary confinement by prison disciplinary proceedings. Although in *Wolff* the right

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for convicted persons and a yet stricter standard when the procedure will be provided to those within prison walls. With respect to procedures required, *compare* Goldberg v. Kelly, 397 U.S. 254 (1970), *with* Morrissey v. Brewer, 408 U.S. 471 (1972); *compare Morrissey with* Wolff v. McDonnell, 418 U.S. 539 (1974).

[117] 520 F.2d at 378.

[118] *Id.* The court relied primarily on the stricter security and fewer rehabilitative programs at the receiving institution compared to the lower security-level sending prison. It also cited the possible adverse effects on the inmates' records, and on future parole and furlough opportunities. *Id.*

[119] *Id.* at 379 n.6.

[120] 96 S. Ct. at 2538; 96 S. Ct. at 2547.

[121] 96 S. Ct. at 2538-39.

to good time credit was made explicit by state statute, no statute there conferred on prisoners the right to avoid solitary confinement. The prisoner's liberty interest in avoiding solitary confinement emanated not from statutory grant, but apparently from an implicit understanding from prison practice that it would be imposed only as provided by the state disciplinary regulations, which predicated use of either sanction on serious misconduct. The *Wolff* Court had explained that it could not "for the purposes of procedural due process . . . distinguish between them"; thus solitary confinement, being a major change in the conditions of confinement, was included with loss of good time as requiring due process protection before imposition of discipline.[122]

The Court's initial application of the due process clause to prison conditions, *Haines v. Kerner*,[123] was not predicated upon existence of a state-created liberty interest, and there was also support in *Morrissey v. Brewer* for the proposition that an interest in liberty can be established without having been created explicitly by statute. The state there created the opportunity for parole but conferred no statutory right for the parolee to remain on parole. *Morrissey* held that the conditional liberty of parole, once granted, could not be summarily revoked, because "[t]he parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions."[124] Avoidance of the loss of liberty while on parole was protected not by explicit state law but by reliance on fair, nonarbitrary state action. The *Wolff* Court repeated this principle: "The touchstone of due process is protection of the individual against arbitrary action of government."[125]

Even though prisoners' reliance upon understandings or "implicit promises" derived from state corrections practice supported the existence of a liberty interest in *Haines, Morrissey*, and *Wolff*, the Supreme Court appears to have said in *Meachum* and *Montanye* that nothing less than an explicit state statute or regulation can create the requisite protected liberty interest. Many lower federal courts had relied upon that trio of due process decisions,[126] as did the First

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[122] 418 U.S. at 571 n.19.

[123] 404 U.S. 519 (1972).

[124] 408 U.S. 471, 482 (1972).

[125] 418 U.S. at 558 (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889)).

[126] Citing *Wolff*, one court stated that "a major [adverse] change in the conditions of confinement is considered the equivalent of loss of good time, invoking the guarantees of due process." Daigle v. Hall, 387 F. Supp. 652 (D. Mass. 1975). Other cases holding that major adverse changes in conditions of confinement invoke due process include Stone v. Egeler, 506 F.2d 287 (6th Cir. 1974); Ault v. Holmes, 506 F.2d 288 (6th Cir. 1974), *aff'g* 369 F. Supp. 288 (W.D. Ky. 1974); Gomes v. Travisono, 490 F.2d 1209 (1st Cir. 1973); Fajeriack v. McGinnis,

Circuit in *Meachum v. Fano*,[127] and granted transferred inmates the right to due process protections. In light of this it is disappointing that the Court did not satisfactorily explain why transferred prisoners could not rely upon their understandings of existing prison practice that they would not be transferred absent misbehavior. The Court, pointing to the statutes of Massachusetts and New York that vested complete discretion in prison officials to effect transfer of state prisoners, declared that in light of this state-granted discretion, prisoners' expectations to the contrary were "too ephemeral and insubstantial."[128] It was, however, precisely this kind of discretionary power vested by state law or prison practice in prison administrators which the Court held unconstitutional on due process grounds in *Haines*,[129] *Morrissey*,[130] and *Wolff*.[131] The fundamental difference between the discretionary power to transfer exercised in *Meachum* and *Montanye* and the unconstitutional discretionary powers found in the earlier prisoner cases remains unexplained, except, of course, by the holdings. In *Haines, Morrissey,* and *Wolff* the Court perceived a protected liberty interest as being at stake; in *Meachum* and *Montanye* it did not.

2. The Second Circuit's Analysis in *Montanye*

It is also difficult to understand why the Court summarily rejected the Second Circuit's reasoning in *Montanye v. Haymes*, which, unlike that of the First Circuit and others, was squarely based on the provisions of state corrections law.[132] The Supreme Court in

493 F.2d 468 (9th Cir. 1974); Tai v. Thompson, 387 F. Supp. 912 (D. Hawaii 1975); Collins v. Bordenkircher, 403 F. Supp. 820 (N.D. W. Va. 1975); Clonce v. Richardson, 379 F. Supp. 338 (W.D. Mo. 1974); Walker v. Hughes, 368 F. Supp. 32 (E.D. Mich. 1974); Robbins v. Kleindienst, 383 F. Supp. 239 (D.D.C. 1974).

[127] 520 F.2d 374 (1st Cir. 1975), *rev'd*, 96 S. Ct. 2532 (1976).

[128] 96 S. Ct. at 2540. To give substantiality to the prisoners' expectations, a "state law or practice" is needed. If the prisoners had proved that despite the discretionary transfer statute, transfers were as a matter of *prison practice* effected in response to inmate misconduct, would they have succeeded in establishing a substantial enough expectation? It seems unlikely, for the Court has stated the following: "That an inmate's conduct . . . may often be a major factor in the decision of prison officials to transfer him is to be expected unless it is assumed that transfers are mindless events." *Id.* The Court seems to require prison practice which is itself rooted in state law. *See* text accompanying notes 145-60 *infra*.

[129] 404 U.S. 519 (1972) (summary imposition of solitary confinement as a disciplinary measure).

[130] 408 U.S. 471 (1972) (parole based upon negative report of parole officer without prior hearing before parole board). *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (summary revocation of convicted's probationary status).

[131] 418 U.S. 539 (1974) (imposition of serious disciplinary sanctions without prior hearing).

[132] 505 F.2d 977, 981 (2d Cir. 1974), *rev'd*, 96 S. Ct. 2543 (1976). *See* text accompanying notes 91-92 *supra*.

Montanye properly summarized the Second Circuit's legal theory: "Haymes should no more be punished by a transfer having harsh consequences than he should suffer other deprivations which under prison rules could not be imposed without following specified procedures."[133] The lower court's decision in *Montanye* was a straightforward application of "pure" procedural due process—that is, in its most literal sense, the due process clause requires that a state follow its own procedures rather than allowing its officials to take arbitrary action.[134] If Haymes was transferred as punishment for his conduct, state prison officials had employed a punishment, prison transfer, that was not an allowed sanction under prison regulations. Furthermore, the summary transfer had circumvented established disciplinary procedures that required notice and some form of hearing prior to punishment. The Second Circuit realized that the prison officials may have labelled the disciplinary transfer an administrative action in order to avoid the due process procedures otherwise required in prison discipline.[135] The court did not follow the "grievous loss" analysis attributed to the First Circuit in *Meachum*, but it did consider the serious adverse consequences of involuntary transfer to support its conclusion that it was as severe as any penalty explicitly enumerated in the state prison regulations.[136]

The Supreme Court did not appear to disagree with the Second Circuit's evaluation of the hardships produced by summary transfer, but the Court flatly rejected the theory that interprison transfer intended as punishment required use of the disciplinary procedures established by the state prison regulations. The Court focused instead upon the New York statute that granted prison officials the discretionary power to transfer inmates, and noted that such transfers were not conditioned upon misconduct or any other event. The Court apparently recognized the possibility that an ostensibly administrative transfer of a prisoner could in fact be undertaken as a disciplinary

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[133] 96 S. Ct. at 2546.

[134] Due process serves as a general prohibition against government arbitrariness. *See* Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 268 (1970); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurther, J., concurring).

[135] Since the prison officials in Haymes' case asserted his violation of a prison rule, it is unclear why they chose not to proceed against him under established disciplinary procedures. Ironically, their choice of summary transfer gratuitously avoided a notation of disciplinary action upon his record. That could be a benefit to Haymes except that his file now contains instead the bare comment that his "illicit activities in the law library necessitated transfer." Respondent's Brief on Merits at 36 n.38, Montanye v. Haymes, 96 S. Ct. 2543 (1976).

[136] The Court cited the prisoner's separation from family, friends, and counsel by virtue of the transfer and projected the possibility of its effects on parole, educational and rehabilitative programs, personal belongings, and medical treatment. 505 F.2d at 981-82.

measure, but it did not acknowledge the possible unfairness or abuse of discretion worked by state action unrestrained by even its own disciplinary rules and regulations.[137] The sole critical factor in the Court's analysis was that there must be some explicit basis in state statute or regulation for invoking the procedural protection of the due process clause for interprison transfers.[138]

Although the Supreme Court has often said that the applicability of the due process clause no longer depends on whether state action affects a "right" rather than a "privilege,"[139] the dichotomy that the Court is now emphasizing—between plaintiffs who have an explicit state law entitlement and those with only "unilateral expectations"—bears a close resemblance to the former doctrine.[140] The reasoning of the right-privilege distinction was that what a state could deny altogether—*i.e.*, a "privilege"—it could withhold on whatever terms it chose. *Meachum* and *Montanye* rely upon a correlative rationale that interests protected by due process are what state law says they are.[141] If that is so, and if prison officials' discretionary authority granted by state law is not ordinarily subject to judicial review, then that analysis when carried to its logical end brings the history of prisoners' rights full circle, to having few constitutionally protected rights at all.[142]

B. *Applying the* Meachum-Montanye *Due Process Standard*

Meachum v. Fano and *Montanye v. Haymes* came to the Supreme Court on appeal of the issue of the state's constitutional duty to provide notice and hearing comporting with the due process clause prior to an interprison transfer.[143] The Court's refusal to recognize

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[137] The Court refused to distinguish between administrative and disciplinary transfers even for cases in which, as in *Montanye*, "prison authorities transfer a prisoner to another institution because of his breach of prison rules." 96 S. Ct. at 2547. Having conceded a prison rule violation which may have called for use of the prison's disciplinary regulations, the Court did not explain why those established regulations may be ignored in favor of action under the wholly discretionary transfer statute. The Court did, however, assert that "the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight." *Id.*

[138] 96 S. Ct. at 2547; 96 S. Ct. at 2539-40.

[139] *See* cases cited note 25 *supra.*

[140] That is, if one has an "entitlement" under state law, then one has a "right" to due process. Given the historical development from the right-privilege distinction to the entitlement theory, it seems safe to say that the entitlement doctrine is the more liberal interpretation of when due process applies. It is suggested here that a stricter standard for finding a statutory entitlement reverts the analysis back to requiring, in effect, an established "right" before due process applies.

[141] *See* Meachum v. Fano, 96 S. Ct. 2532, 2542 (1976) (Stevens, J., dissenting).

[142] *See* Comment, *Entitlement*, *supra* note 26, at 107-11.

[143] *See* section II *supra.*

such a duty places heavy burdens on future prisoners challenging summary transfer and other incidents of prison life on due process grounds. From the Court's broad holding it is clear that, to survive the state's motion to dismiss for failure to state a claim upon which relief can be granted, the prisoner now must allege and offer to prove some basis in state law or prison practice for an interest sufficient to invoke the protection of due process. To contest interprison transfer in particular, the inmate must under the *Meachum-Montanye* standard establish either the right to remain in a particular prison or his expectation, justified by statutory or regulatory law, that he would not be removed to another prison unless found guilty of misconduct. While the Court did not elaborate on the form that such a basis in state law or practice must take, it is evident that the Court would require a clear and convincing showing of the prisoner's right or expectation based on state statute or regulation.[144]

The Court may have placed an inordinately difficult burden on prisoner litigants. Presumably, the inmate who can point to a state statute or regulation providing pretransfer notice and hearing would have the strongest defense to a motion to dismiss. His right to those procedures would not be indefeasible, however. Using the traditional balancing of interests approach to establish the procedures required once the due process clause has been determined to apply, the individual's interest in avoiding the loss imposed by the state must be weighed against the state's interest in taking summary action.[145] Against the inmate's claim that he was denied his procedural rights, the state may assert institutional interests that necessitated suspension of the mandated procedures. The exception for emergency conditions, long recognized in due process cases arising outside the prison setting,[146] is an especially potent argument for prison administrators seeking to excuse their failure to provide the usual prison procedures.[147] The federal courts have allowed that, if confronted with

[144] *See* 96 S. Ct. at 2534; text accompanying notes 117-36 *supra*.

[145] *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972). *See generally* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

[146] *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (seizure of yacht thought to be used for drug trafficking); Fuentes v. Shevin, 407 U.S. 67, 91 (1972) (replevin procedures); Bell v. Burson, 402 U.S. 535, 542 (1971); Phillips v. Commissioner, 283 U.S. 589, 597 (1931) (summary action in aid of tax collection).

[147] However, recognition of security needs within prisons does not necessitate an absolute refusal to apply due process. *Compare* Wolff v. McDonnell, 418 U.S. 539 (1974) (minimal procedures required in internal prison disciplinary hearings), *with* Morrissey v. Brewer, 408 U.S. 471 (1972) (trial-type procedures required for parole revocation hearing outside prison walls).

volatile conditions endangering the health and welfare of inmates or prison security, prison officials may act summarily when such action is necessary to alleviate internal pressures and restore responsible control to the institution.[148]

The courts do not ordinarily question the judgment of the prison administration concerning the severity of prison conditions or the corrective action demanded by the circumstances.[149] A state of wholesale insurrection within prison walls is not required to justify dispensing with established procedures. Prison officials can cite prison conditions as giving rise to fears of imminent riot or of less major disturbances. Unfortunately, the foundation for their fears is peculiarly within their knowledge and difficult for the typical inmate to challenge after the fact.[150] Given the judiciary's usual deference to the needs of the prison system and the experience of prison managers, the prisoner may have great difficulty proving that the state unjustifiably withdrew the procedural protection to which the prisoner was entitled under state law or regulation. Thus the inmate's due process claim could be dismissed despite the existence of statutorily based procedural rights upon the state's offering some justification for taking summary action. Nothing in the *Meachum* or *Montanye* opinion limits the state's ability to escape state-created pretransfer procedures by pleading institutional interests or emergency conditions. In restricting the source of prisoners' protected liberty interests to rules and regulations wholly within the control of the state, the Court did not balance that restriction, as it should have,[151] with a corresponding limitation on state action. State action should be fundamentally fair and free of abuse of discretion which would render prisoners' proce-

[148] *See, e.g.*, LaBatt v. Twomey, 513 F.2d 641, 648 (7th Cir. 1975) (prison officials' response to emergency situation curtails rights and privileges of inmates); Haymes v. Montanye, 505 F.2d 977, 980 (2d Cir. 1974), *rev'd*, 96 S. Ct. 2543 (1976) (imminent riot, overcrowding, and related health hazards may justify summary action by prison management).

[149] *See, e.g.*, Blair v. Finkbeiner, 402 F. Supp. 1092, 1095 (N.D. Ill. 1975) (due process and eighth amendment claims dismissed because emergency conditions justified solitary confinement and summary transfer of prisoner); Aikens v. Lash, 371 F. Supp. 482 (N.D. Ind. 1974), *aff'd*, 514 F.2d 55 (7th Cir. 1975), *vacated and remanded*, 96 S. Ct. 1721 (1976); Hoitt v. Vitek, 361 F. Supp. 1238, 1242 (D.N.H. 1973), *aff'd*, 497 F.2d 598 (1st Cir. 1974) (In emergency situations "it is not within the province of the court to second-guess the judgment of corrections officials."); United States *ex rel.* Miller v. Twomey, 333 F. Supp. 1352, 1353 (N.D. Ill. 1971) (accord). Indeed, prison officials' failure to rectify unsafe, overcrowded prison conditions may violate inmates' eighth amendment protection from cruel and unusual punishment. McCray v. Sullivan, 509 F.2d 1332 (5th Cir. 1975), *on remand*, 399 F. Supp. 271 (S.D. Ala. 1975); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971), *aff'g* 309 F. Supp. 362 (E.D. Ark. 1970).

[150] *See* Broude, *supra* note 8, at 159-63; Millemann, *supra* note 8, at 235-42; Note, *Procedural Due Process*, *supra* note 8, at 336-40.

[151] *See* section III.C. *infra*.

dural rights little more than empty promises.[152]

The Supreme Court rejected the arguments raised by the prisoners in both *Meachum* and *Montanye* that punitive transfers effected without following existing prison disciplinary regulations should require the same procedures that would have applied to explicitly disciplinary action. The Court rejected the analogy made between involuntary transfers and other punishments imposed by prison authority, and instead took note that in each case transfer was made under the state discretionary transfer statute, not under prison disciplinary regulations.[153] Since the label attached to the action apparently has significance, the inmate protesting transfer in the future should point to a statute or regulation that deals specifically with interprison transfer to establish his entitlement to pretransfer procedures.

To evaluate how helpful such a statute or regulation might be to the prisoner's case, the following hypothetical is posed. Suppose that under state law prison transfer is a sanction that may be imposed as punishment for inmate misconduct, but neither the statute nor accompanying prison regulations require notice or hearing prior to a punitive transfer.[154] Arguably, an inmate transferred under the statute could establish *some* basis for his right or expectation not to be summarily transferred at the discretion of the state. Although the state seems to have conferred something less than a right to remain in a particular prison, could the inmate be said to have the *justifiable* expectation that he would not be transferred unless *proven* guilty of misconduct? It is doubtful that the inmate could succeed under the *Meachum-Montanye* standard for application of due process procedural protection. The hypothetical's statute and regulations on their terms establish no right to notice of disciplinary charges or to a hearing procedure to ascertain the facts prior to the decision to punish. Indeed, the statute would seem to operate no differently than did the discretionary transfer statutes that precluded the inmates from showing protected liberty interests infringed by transfer in *Meachum* and *Montanye*.[155]

There is an alternative analysis. In *Wolff v. McDonnell*[156] certain

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[152] This had been an independent motivation for applying the due process clause in earlier Supreme Court decisions. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975); Wolff v. McDonnell, 418 U.S. 539, 558 (1974); Morrissey v. Brewer, 408 U.S. 471, 484 (1972) (Douglas, J., dissenting in part); Fuentes v. Shevin, 407 U.S. 67, 80 (1972). *See generally* Comment, *Entitlement*, *supra* note 26.

[153] 96 S. Ct. at 2540; 96 S. Ct. at 2547.

[154] These are essentially the terms of the Nebraska statute and prison disciplinary regulations invalidated in Wolff v. McDonnell, 418 U.S. 539, 545-53 (1974).

[155] 96 S. Ct. at 2540; 96 S. Ct. at 2547.

[156] 418 U.S. 539 (1974).

serious sanctions were sought to be imposed by the state under prison regulations requiring no notice or hearing procedures. The Court found that those sanctions implicated liberty interests protected by due process, and required procedural safeguards prior to the imposition of the punishment. Would transfer of the inmate to another of the state's prisons be considered to implicate fourteenth amendment "liberty" under the statute described above? To resolve that issue one must again resort to state law and practice.[157] If state law also provided for the summary transfer of inmates at the discretion of prison administrators[158] or by other language dispelled the notion of an inmate's right to stay in a particular prison, it would be difficult to argue the existence of a liberty interest rooted in state law. On the other hand, the hypothesized disciplinary transfer statute operates exactly like the statute imposing disciplinary solitary confinement that was held an unconstitutional deprivation of due process in *Wolff*.[159] It imposes punishment—interprison transfer—for misconduct, but does not afford any procedures to prevent unfair or arbitrary state action. The conclusion that due process might not apply under the *Meachum-Montanye* standard but could apply under the analysis employed in *Wolff* seems inevitable. Apart from inconsistent results, the hypothetical raises the possibility that the new due process standard could result in no cognizable claim even when an inmate can point to a state law restricting transfer to certain circumstances. If the state additionally reserves the power to determine the existence of the triggering circumstances, its discretion would appear as complete as that found in the discretionary transfer statutes of Massachusetts and New York.[160]

The *Meachum* and *Montanye* opinions may have been intended to leave open the question of whether due process would apply to involuntary transfers imposed by explicit in-prison disciplinary pro-

[157] That is the position taken by the Court in both *Meachum* and *Montanye*. *See* section II *supra*.

[158] Such dual provisions for transfer are not necessarily contradictory because it is not uncommon for transfer provisions to be contained in state statutes that define the scope of authority of certain prison officers. The Massachusetts statute in *Meachum* and the New York law in *Montanye* were both examples of this type. Neither statute had accompanying regulations or other statutes which further defined or conditioned the use of the transfer authority. Some state statutes are more narrowly drawn to require, for example, judicial approval for the transfer upon the request of prison officials. *See* IOWA CODE ANN. § 246.12, 246.13 (1969); PA. STAT. ANN. tit. 61, § 72 (1964).

[159] *See* 418 U.S. at 545-53.

[160] Ironically, the state's silence on how and when its transfer authority will be exercised can be as effective as an explicit reservation of decision-making power in transfer cases. *See* N.Y. CORREC. LAW § 23 (McKinney Supp. 1974), cited and discussed with respect to *Montanye* at note 95 *supra*.

ceedings. On the other hand, their holdings may have suggested the resolution in that case by implication. The due process clause was held inapplicable "absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events";[161] under the same standard, if the state does condition the transfer of inmates on proven misconduct, the protection of due process should be required. That conclusion turns the inquiry to the conditions under which the state imposes transfer, the reciprocal question to the one posed at the outset of this discussion, *i.e.*, what form the "basis in state law or practice" must take to establish the inmate's right or justifiable expectation to avoid transfer. The predicate for invoking due process clearly depends upon state law and practice, but the *Meachum* and *Montanye* opinions leave in confusion the features of state statutory schemes for prison regulation that will be sufficient to establish that prerequisite to due process protection. Proving that such interests are rooted in state law has been and will continue to be the critical problem for prisoner plaintiffs. Such proof cannot be easy for persons whose rights are severely limited by their confinement and whose lives are controlled by state rules and regulations. State correction laws are promulgated to control, regulate, and restrict the inmate population. By design they are not likely sources for a panoply of inmate rights and liberties. Yet under the *Meachum-Montanye* standard the laws and practices of the states are the starting points in the due process analysis to determine what constitutionally protected interests are retained by state prisoners after conviction.

The Court's due process analysis may be more beneficial to prisoners' rights than is apparent on its surface, however. The new due process standard is more definite in application and more predictive in result than either the "grievous loss" analysis used by the First Circuit in *Meachum*[162] and other lower courts or the "pure" procedural theory applied by the Second Circuit in *Montanye*.[163] Under these standards, whether an inmate suffers a loss sufficiently grievous to warrant due process depends largely on the perception of individual judges. While appearing more sympathetic to prisoners' plight, a "grievous loss" standard for applying due process ultimately establishes few firm rights for all inmates. It operates on a case-by-case basis to provide relief for some prisoners and deny protection to others.[164] The "pure" procedural analysis of *Montanye* can lead to

[161] 96 S. Ct. at 2534.

[162] *See* text accompanying notes 117-19 *supra*.

[163] *See* text accompanying notes 132-36 *supra*.

[164] Notwithstanding this inequity, some argue that the loss analysis is functionally prefera-

unsatisfactory results as well. As used by the Second Circuit, that standard required pretransfer procedures consistent with the motive of prison officials in undertaking the transfer. Any transfer that follows on the heels of a rule violation or minor reprimand may be perceived by the prisoner as retaliation for his conduct, but proving the causal connection between his conduct and the later transfer is quite difficult after the inmate is transferred without explanation and imprisoned many miles from the source of any evidence of the motive for his transfer.[165]

The Supreme Court rejected these analyses, but not on the basis that they inadequately served prisoner claims. The Court's concern was the increased involvement of the judiciary in the administration of state prisons that would result from applying the due process clause under those analyses.[166] The policy rationale given in *Meachum* expressed the adverse consequences of involving due process from only the state's viewpoint. The Court did not acknowledge the policy considerations voiced in earlier cases that prisoners, like persons generally, should be protected from arbitrary action of government;[167] that governments must use a "fair process of decision making";[168] that society has an interest in treating inmates "with basic fairness";[169] and that fair treatment will enhance prisoner rehabilitation "by avoiding reactions to arbitrariness."[170] Rather, the approach of the Court resembled the traditional "hands off" attitude towards prisoners' rights litigation. The *Meachum* and *Montanye* decisions endorsed the unreviewed administrative discretion granted to prison officials by state law with the Court expressing the view that the federal courts have neither authority nor jurisdiction to act as prison review agencies.[171] The Court's language even revived the "floodgates" rationale for denying prisoners the protection of due process—that applying the clause to one incident of prison life will

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ble and better fulfills the purpose of the fourteenth amendment than the entitlement doctrine. *See, e.g.*, Broude, *supra* note 8, at 141-42 & 152-53; Comment, *Entitlement*, *supra* note 26, at 110-19.

[165] The Second Circuit did not recognize the unmanageability of its motive criterion for due process in *Montanye*. Under its approach the inmate who alleges a punitive intent on the part of prison officials must be given an opportunity in court to prove that allegation and the adverse consequences arising therefrom. The likely result of this seemingly qualified holding would be identical (from the standpoint of requiring procedures prior to transfer) to a flat application of due process safeguards to all involuntary transfers.

[166] 96 S. Ct. at 2540.

[167] Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

[168] Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

[169] Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

[170] *Id.*

[171] 96 S. Ct. at 2540.

proliferate frivolous inmate challenges to all aspects of their prison confinement.[172]

C. *Liberty Interests After Conviction*

"Conviction" may be a term of art,[173] but the meaning of conviction in terms of its impact upon the individual has been less susceptible to discrete description. It is now firmly established that individual liberty can coexist with the legal custody that follows conviction;[174] a quantum of liberty is retained by one physically confined to a state penal institution.[175] Yet the *extent* of constitutional liberty retained by the imprisoned has not been precisely defined. Our traditional understanding of conviction and imprisonment recognizes that the state has certain power over the convicted, including the power to determine where prisoners will be confined during their sentences. That traditional understanding was directly challenged by the prisoners protesting involuntary transfer between state prisons in *Meachum v. Fano* and *Montanye v. Haymes*. The response of the Supreme Court to that challenge endorsed our traditional understanding: "Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose."[176]

The Court also particularized the meaning of conviction by setting more definite limits on the application of the due process clause. The clause "by its own force" forbids loss of liberty by conviction without due process of law. But after conviction, due process does not "in and of itself" apply to the initial assignment of a convict to a particular institution or to the transfer of a prisoner from one institution to another within the state penal system, and it does not "in itself

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[172] To apply due process to interprison transfers "would place the Clause astride the day-to-day functioning of state prisons . . . ." *Id.* Other cases in the 1975 Term, while not using the explicit "floodgates" language, suggest the Supreme Court's concern for the growing size of the federal courts' caseload. *See, e.g.*, Stone v. Powell, 96 S. Ct. 3037 (1976) (federal forum and its habeas corpus jurisdiction unavailable for vindicating fourth amendment rights and invoking exclusionary rule thereunder); Warth v. Seldin, 422 U.S. 490 (1975) (denying standing to litigate claims of alleged racially discriminatory city zoning code).

[173] Conviction in a general sense is the result of a criminal trial, the finding by the jury or court of a verdict or the confession of the accused, which ends in a judgment that the accused is guilty as charged. In legal parlance, however, it often denotes the final judgment itself. *See* Hershey v. People *ex rel.* Johnson, 91 Colo. 113, 116, 12 P.2d 345, 346-47 (1932); Marino v. Hibbard, 243 Mass. 90, 92, 137 N.E. 369, 369-70 (1922); Blaufus v. People, 69 N.Y. 107, 112-13, 25 Am. Rep. 148, 151 (1877); Commonwealth v. Minnich, 250 Pa. 363, 366-68, 95 A. 565, 567-68 (1915); Emmertson v. State Tax Comm'n, 93 Utah 219, 224-25, 72 P.2d 467, 470 (1937).

[174] Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

[175] *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Haines v. Kerner, 404 U.S. 519 (1971).

[176] Meachum v. Fano, 96 S. Ct. 2532, 2538 (1976).

subject an inmate's treatment by prison authorities to judicial oversight."[177] *A fortiori*, those incidents of prison life not subject to examination under the due process clause are aspects of individual liberty that have been extinguished by conviction. This recognition is a corollary to the fact that prisoner suits challenging the condition of confinement under the due process clause necessarily require a judicial determination of the constitutional interests in liberty or property retained by the convicted.

Past federal decisions have determined the nature of convicted persons' protected liberty to include aspects of traditional liberty, *e.g.*, interests in shortened sentences through good time credit and in the conditional liberty enjoyed on parole and probation,[178] as well as a degree of institutional liberty, *e.g.*, that affected by confinement in solitary.[179] Institutional liberty represents, of course, a relative liberty based on the recognition that life can vary even in prison and that incarceration is not a monolithic experience. Prison privileges and programs are not equally available for all prisoners. Involuntary transfer in particular can adversely affect those aspects of prison life, abruptly ending an inmate's participation in educational and rehabilitative programs and sending him to another institution with different, perhaps fewer, programs and privileges.[180] Consequently, the Court's decision in *Meachum* and *Montanye* that, absent explicit state law or regulation to the contrary, interprison transfer does not implicate inmates' protected liberty interests means that inmates have no protectable interests in such programs unless the state confers upon them a right to those benefits.

While the exclusion of these incidents of prison life follows from the Court's broad holding that some basis in state law or practice must exist to create a protected interest, other less obvious consequences of summary transfer would seem to now fall outside the range of inmates' protectible liberty interests as well.[181] Prior to trans-

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[177] *Id.*; Montanye v. Haymes, 96 S. Ct. 2543, 2547 (1976).

[178] Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972). *See* United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973); Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla.), *vacated and remanded on other grounds*, 491 F.2d 417 (5th Cir. 1973), *cert. denied*, 416 U.S. 992 (1974); Note, *Procedural Due Process*, *supra* note 8, at 340-45.

[179] Haines v. Kerner, 404 U.S. 519 (1972). *See* Thomas v. Pate, 493 F.2d 151 (7th Cir. 1974); Note, *Prison Discipline*, *supra* note 6, at 936-39.

[180] *See* White v. Gillman, 360 F. Supp. 64, 66 (S.D. Iowa 1973) (loss of rehabilitative opportunities and harsher discipline); Gomes v. Travisono, 353 F. Supp. 457, 462-63 (D.R.I. 1973); Hoitt v. Vitek, 361 F. Supp. 1238 (D.N.H. 1973).

[181] The far-reaching repercussions of involuntary transfers upon inmates' lives are explored more fully in Broude, *supra* note 8; Millemann, *supra* note 8, at 228-34; Note, *Procedural Due Process*, *supra* note 8, at 345-49; Note, *Prison Discipline*, *supra* note 6, at 938-39.

fer many inmates are able to maintain closer personal contact with family and friends. Even though their visits are recognized as playing an important role in rehabilitation, transfer to a prison in another part of the state often precludes those relationships.[182] Transfer also separates inmates from their legal counsel, burdening their constitutional rights to effective access to counsel and the judicial system.[183] Prison transfers can have adverse effects on credit given for good time and on future possibilities for parole. Ironically, a prisoner recently transferred can only speculate on what the full effects of his transfer will be in the absence of an explanatory notice and a factfinding hearing. Similarly, an inmate's record disclosing only the bare fact of transfer can lead prison officials to adverse conclusions about its circumstances when making decisions in the context of parole or good time credits.[184] In its *Meachum* opinion the Supreme Court insisted that a showing of adverse effects on parole would not change its decision because the granting of parole had not itself been determined to implicate liberty protected by due process.[185]

Even though the *Meachum* and *Montanye* opinions affirm that prisoners retain rights guaranteed under explicit constitutional provisions, the opinions repeatedly point to state law and regulation as the source of the balance of prisoners' interests protected by due process after conviction. The conclusion reached must be (as the earlier prisoner cases held[186]) that state convictions strip the convicted of their constitutional liberty, but (as the more recent decisions apparently signify[187]) that the state at its option can by legislation or regulation restore selected aspects of liberty to the benefit of its prisoners. This theory for reestablishing the convicted's residual protected interests finds its legal antecedent in the entitlement doctrine which the Court developed in formulating a definition of "property" within the mean-

[182] Keliher v. Mitchell, 250 F. 904 (D. Mass. 1916). *Cf.* Pell v. Procunier, 417 U.S. 817 (1974) (noting positive rehabilitative effects of visits from family and friends). *But see* Lindsay v. Mitchell, 455 F.2d 917 (5th Cir. 1972) (dismissing prisoner challenge to transfer on grounds it deprived him of visits from his family); Hillen v. Director, 455 F.2d 410 (9th Cir.), *cert. denied*, 409 U.S. 989 (1972).

[183] *See* Gomes v. Travisono, 353 F. Supp. 457, 469-70 (D.R.I. 1973), *aff'd*, 490 F.2d 1209 (1st Cir. 1973), *on remand*, 510 F.2d 537 (1974). *Accord*, Hoitt v. Vitek, 361 F. Supp. 1238, 1248-49 (D.N.H. 1973).

[184] *See* Haymes v. Montanye, 505 F.2d 977, 982 (2d Cir. 1974), *rev'd*, 96 S. Ct. 2543 (1976); Gomes v. Travisono, 353 F. Supp. 457, 463-64 (D.R.I. 1973); Hoitt v. Vitek, 361 F. Supp. 1238, 1249 (D.N.H. 1973); Braxton v. Carlson, 340 F. Supp. 999, 1002 (M.D. Pa. 1972), *aff'd*, 483 F.2d 933 (3d Cir. 1973).

[185] 96 S. Ct. at 2540 n.8.

[186] *See* section I.A. *supra.*

[187] *See* section I.B. *supra.*

ing of the due process clause. The recognized weakness of conditioning due process protection upon an entitlement under state law is that nothing in the doctrine prevents the state from setting the terms under which such property rights exist.[188] Under circumstances determined to exist by the state, using any method it chooses to make that determination, the property right fails and there is no longer a protected interest requiring the protection of due process. In view of the fact that the fourteenth amendment was intended to place some restraints on unfettered state action, use of the entitlement doctrine thus results in a disingenuous interpretation of the application of the due process clause.

Determining prisoners' constitutional rights after conviction by looking to state-law entitlements presents some danger. Ultimately the state can fashion prisoner rights in any manner and upon such terms that it chooses, and the state can condition those rights upon circumstances that it alone determines to exist. Unless the state sees fit to define liberties for its inmates, their interests protected by due process will be those basic rights originating in the Constitution and no more. Indeed, states can respond to the implicit invitation offered by *Meachum* and *Montanye* and destroy inmate liberty interests formerly created by state law and prison practice through purposeful amendment. It would not require expert draftsmen to compose statutory language dispelling any suggestion that rights or protected interests were being conferred upon prisoners. Further, states can apparently avoid the burdens of existing prison procedures by labelling everything that prisons do as administrative or discretionary action.[189] Thus the logic of *Meachum* and *Montanye* allows conviction to mean subjection to the unconditioned and unreviewed discretionary will of the state.

IV. CONCLUSION

The Supreme Court's consideration of prisoners' rights in the context of involuntary transfers between state prisons indicates that prison life is still recognized as implicating constitutional interests of

[188] This is not to say that the Supreme Court will not question the wisdom of the state legislative judgment on substantive issues although applying the entitlement doctrine. See Vlandis v. Kline, 412 U.S. 441 (1973); Perry v. Sinderman, 408 U.S. 593 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). The entitlement doctrine permits this result but significantly does not require judicial second-guessing of the legislative choice. *See* Comment, *Entitlement, supra* note 26.

[189] This was the explicit basis of the Second Circuit's holding in *Montanye*. 505 F.2d 977, 981. *See* United States *ex rel.* Johnson v. Chairman, 500 F.2d 925, 928 (2d Cir. 1974), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1975); Howard v. Smyth, 365 F.2d 428 (4th Cir. 1966); Kessler v. Cupp, 372 F. Supp. 76 (D. Ore. 1973).

inmates. *Meachum v. Fano* and *Montanye v. Haymes* are not examples of the sort of judicial activism undertaken by the Supreme Court in other areas, however. Indeed, the opinions place in doubt how far the Court is willing to go in reviewing internal prison affairs.

The Court's candid definition of the sources of prisoners' protected interests under the due process clause shows that the tentative approach taken in earlier cases has been abandoned. The decisions demonstrate that the Court has adopted a modified "hands off" approach: it will leave the definition of an individual's rights after conviction and imprisonment to the states, and will not apply the due process clause to prisoner interests unless they either originate in the Constitution or are created by state law or practice. The Court in *Meachum* and *Montanye* endorsed the traditional idea that the primary control of prison systems remains with the states; but it did not foreclose from future judicial review prisoners' claims based on deprivation of their constitutionally protected interests as these decisions narrow and define them.

By specifying state law as the source of prisoners' protected interests, the Court was able to shape a far more definitive, albeit restrictive, standard for application of the due process clause to prisoner claims, and at the same time avoided increased federalization of the relationship between the state and its prisoners. The Court may with good reason believe that federal judges are not expert in managing penal institutions, but it is doubtful whether state prison authorities are any more adept at determining when constitutional interests should be protected. By leaving substantive *and* procedural decision making to the judgment of prison officials, the Court allows the states unchecked and unbalanced power over essential inmate liberties. The clear signal given by *Meachum* and *Montanye* to those active in prison reform is that they should now petition the state legislatures and not the federal courts for redress of prisoner grievances.

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